SUPREME COURT, U. S.

FILED

MAY 30 1975

MICHAEL RODAK, JR., CLERK

No. 74-1232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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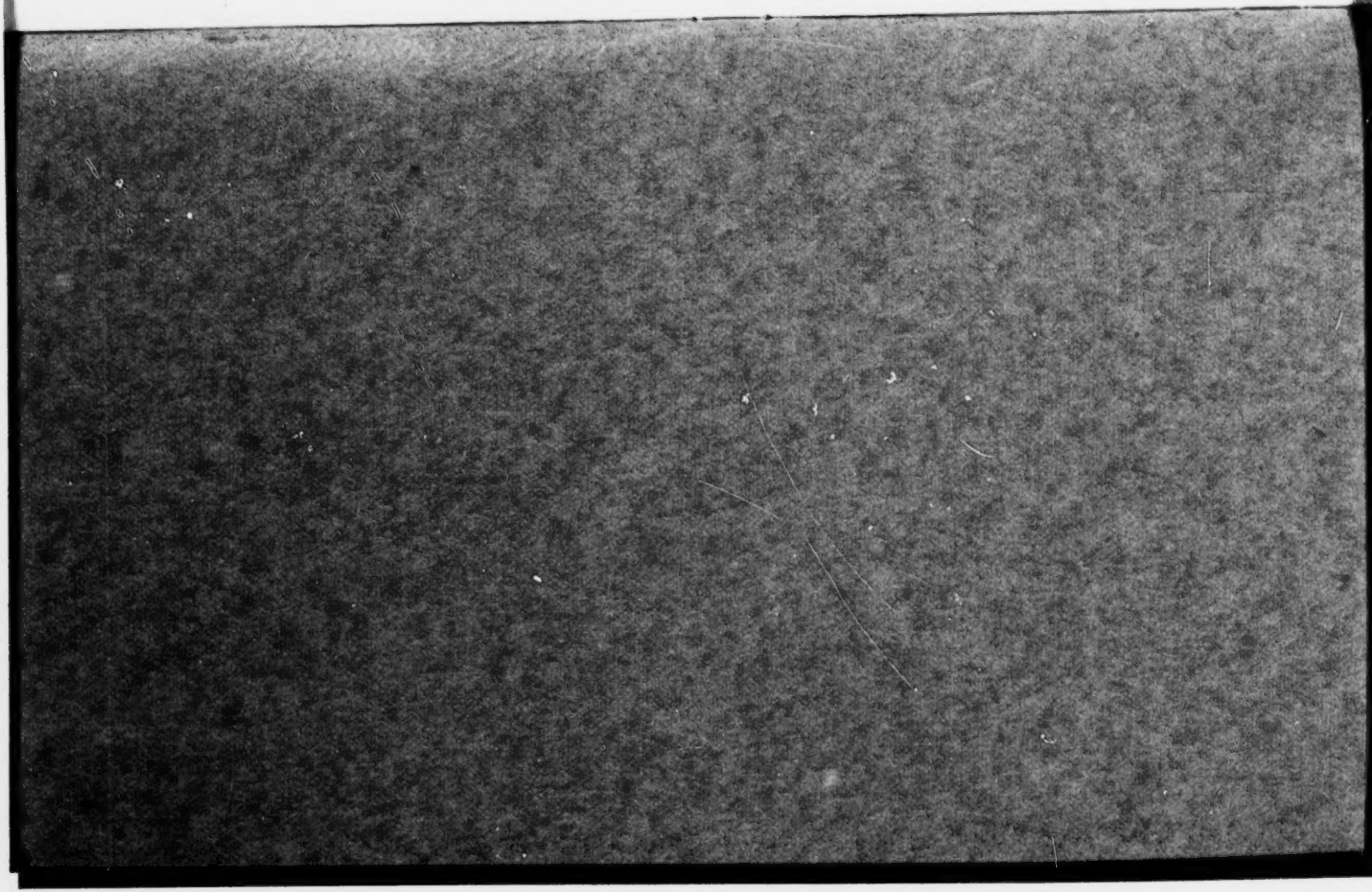

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Petitioner Beltronics, Inc. submits this Reply Brief in reply to arguments first raised in the briefs in opposition.

I

THE SCHWINN ISSUE IS PROPERLY BEFORE THE COURT

Respondents' arguments that the Schwinn issue is not properly before the Court ignore the controlling fact that the Court of Appeals actually decided that issue.

It was Petitioner's position before the District Court that its antitrust claim properly alleged violation of Section 1 of the Sherman Act because of, inter alia, the contractual restriction on resale of cable and wire sold by Western Electric to Eberline. Nevertheless, because this was questioned by counsel for Respondents more than one year prior to trial, Petitioner, out of an abundance of caution, moved to amend its antitrust claim to set forth even more specifically allegations concerning the resale restriction. The motion to amend was denied because the case was then over three years old, was therefore considered by the Judicial Conference to be an emergency case, and the District Court consequently would not allow any amendment which introduced new theories into the case. Implicit in that ruling was the decision that the Schwinn issue was not already contained in the antitrust claim.

Petitioner appealed the denial of the motion to amend to the Court of Appeals on the grounds that, first, the

District Court erred in ruling that the Schwinn issue was not already included in the antitrust claim, and, second, the District Court's denial of the motion to amend was an abuse of discretion.

The Court of Appeals did not specifically mention this aspect of Petitioner's appeal in its opinion, but its actual decision of the Schwinn issue belies any argument that it did not implicitly overrule the District Court on the existence of that issue in the case. (App. 31a)[1] Whether the Court of Appeals thought the issue was already in Petitioner's antitrust claim, or thought the motion to amend should have been granted, is not material. The fact that the issue was decided is controlling. Had the Court of Appeals desired to affirm the District Court's refusal to accept the Schwinn issue it would simply have done so, and had it done so decision of the issue itself would not have been necessary.

Respondents argue that the issue was not litigated, and that no findings of fact or conclusions of law were entered on the issue. Nevertheless, the essentially undisputed evidence which was admitted on other issues combined with the Findings of Fact which were made was sufficiently broad to allow the Court of Appeals to decide that the

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1 The reference "App. __" is to the Appendix to Petitioner's Petition For a Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit.

Schwinn doctrine did not apply to this case.

This case is therefore in the posture that the Court could reverse the Court of Appeals and hold that there exists a violation of the Schwinn doctrine, and remand the case for a trial on damages. Or, in the alternative, the Court could reverse the Court of Appeals' distinguishing of this case from Schwinn on the basic facts, and remand for a further trial on the question of violation. The latter alternative would permit a trial on the issue with the guidance of this Court. Petitioner would then pursue discovery in this area which was disallowed by the District Court, and re-offer the evidence which was excluded at trial. Petitioner would thus be able to establish an even stronger factual basis for violation of the Schwinn doctrine, if this is deemed necessary.

II

THE VIOLATION OF THE SCHWINN DOCTRINE WAS THE PROXIMATE CAUSE OF PETITIONER'S DAMAGE

The District Court found that prior to 1962 Beltronics, as a sales representative, sold the predecessors of the subject products to the Bell Telephone Companies. (App. 3a-4a) Following issuance of the Bell Laboratories' specifications and the Western Electric Supply Contract in 1962, Beltronics sold

the subject products, as a sales representative, not to the Bell Telephone Companies but instead to Western Electric as was required by the plain terms of the supply contract. (RA 1051-1069; 969-976; 1036-1042)[2]

Respondents' reference to the activities of Beltronics which the District Court found gave Western Electric grounds to believe its entertainment and gift policy had been violated, and other activities of Beltronics, do not change the central fact that, but for the contractual restriction on resale of the cable and wire, Western Electric's decision not to do further business with Beltronics would not have prevented Beltronics from fulfilling its commitment to Eberline by selling the subject products directly to the Bell Telephone Companies and to the non-Bell telephone companies in the telephone industry. Accordingly, the recited activities of Beltronics are irrelevant to the issue of proximate cause in the antitrust claim.

CONCLUSION

Respondents have attempted to inject procedural issues into this case which simply do not exist. The Schwinn issue was unquestionably decided by the Court of Appeals and it is axiomatic that courts of appeal do not decide

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2 The reference "RA __" is to the Appendix filed with the Court of Appeals, a copy of which has been lodged with the Clerk of the Court.

issues which do not require decision. Therefore, the inevitable conclusion is that the Court of Appeals decided that the Schwinn issue was properly pleaded, or the motion to amend the antitrust claim should have been granted. The Schwinn issue was thus preserved for review by this Court.

Respondents have attempted to divert attention from the basic antitrust issue by references to entertainment and other activities of Beltronics. These actions, however, are irrelevant to the fundamental violation of Section 1 of the Sherman Act being presented to the Court.

The arguments first raised in the briefs in opposition should be rejected, and for the reasons stated in the Petition the Writ should be granted.

Respectfully submitted,

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Dated: May 22, 1975